

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE

IN THE MATTER OF THE PETITION OF THE)	
DELAWARE DIVISION OF THE PUBLIC ADVOCATE)	
AND THE CAESAR RODNEY INSTITUTE TO)	
REQUEST THE PUBLIC SERVICE COMMISSION)	
TO AMEND 26 <i>DEL. ADMIN. C.</i> § 3008-3.2.21 TO)	PSC DOCKET 15-1462
ISSUE REGULATIONS GOVERNING WHEN A)	
FREEZE OF THE MINIMUM PERCENTAGES OF)	
ELIGIBLE ENERGY RESOURCES AND SOLAR)	
PHOTOVOLTAICS MAY BE DECLARED)	
PURSUANT TO 26 <i>DEL. C.</i> § 354(i) and (j))	
(FILED OCTOBER 2, 2015 AND OCTOBER 12, 2015))	

**JOINT MOTION OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES
AND ENVIRONMENTAL CONTROL AND THE DELAWARE PUBLIC SERVICE
COMMISSION STAFF REQUESTING THAT THE COMMISSION DENY THE
PETITIONS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE AND
THE CAESAR RODNEY INSTITUTE**

Pursuant to the authority granted in 29 *Del. C.* § 8003 and § 8717, the Department of Natural Resources and Environmental Control (“DNREC”) and the Public Service Commission Staff hereby respectfully move the Public Service Commission (“Commission”) for entry of the attached proposed Order denying the Petitions of the Delaware Division of the Public Advocate and the Caesar Rodney Institute (“Petitioners”), which ask the Commission to amend 26 *Del. Admin. C.* § 3008-3.2.21 to issue regulations governing when a freeze of the minimum percentages of eligible energy resources and solar photovoltaics may be declared pursuant to 26 *Del. C.* § 354(i) and (j). In support of this Motion, DNREC and Staff (“Joint Movants”) assert the following:

1. The Petitioners accurately cited the amended Section 354 of the Renewable Energy Portfolio Standards Act (“REPSA”) which added the provision for a freeze of the minimum renewable energy purchase requirements for regulated utilities under certain circumstances and provided the statutory language of Section 354(i) and (j). The Petitioners further accurately provided the statutory language of Section 362(b) which requires the Commission to adopt rules and regulations to specify the procedures for freezing the minimum cumulative solar photovoltaic requirement as authorized by Section 354(i) and (j).

2. The Petitioners further accurately note that in May of 2011, the Commission issued regulations to implement the revisions to REPSA citing 26 *Del. Admin. C.* §3008-3.2.21, 3.2.21.1, and 3.2.21.2:

3.2.21 The minimum percentages from Eligible Energy Resources and Solar Photovoltaic Energy Resources as shown in Section 3.2.1 and Schedule 1 may be frozen for CRECs as authorized by, and pursuant to, 26 *Del. C.* § 354(i)-(j). For a freeze to occur, the Delaware Energy Office¹ must determine [sic] that the cost of complying with the requirements of this Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACP alternative compliance payments.

3.2.21.1 Once frozen, the minimum cumulative requirements shall remain at the percentage for the Compliance Year in which the freeze was instituted.

3.2.21.2 The freeze may be lifted only upon a finding by the State Energy Coordinator, in consultation with the Commission, that the total cost of compliance can reasonably be expected to be under the 1% or 3% threshold, as applicable.

¹ Consistent with the Delaware Division of the Public Advocate’s terminology, the Delaware Energy Office has transitioned to DNREC’s Division of Energy and Climate. The Joint Movants will refer to the Division of Energy and Climate throughout the rest of this Motion.

3. The Petitioners, however, mistakenly believe that the Commission has delegated its regulatory authority to DNREC's Division of Energy and Climate; and DNREC is exceeding its authority by promulgating regulations specifying the procedures for freezing the minimum cumulative solar photovoltaic and eligible energy resource requirements. This assumption leads the Petitioners to request that the Commission amend its 26 *Del. Admin. C.* § 3008 to direct how DNREC should calculate the total cost of complying with the minimum cumulative solar photovoltaic and eligible energy resource requirements. This calculation forms the basis for whether DNREC – in consultation with the Commission – should freeze the minimum percentage of electrical energy sales with eligible energy resources and solar photovoltaic requirements according to 26 *Del. C.* § 354(i) and (j). The Petitioners' request should be denied for several reasons.

4. First, the Commission already issued its regulation in May of 2011, specifying the procedures for freezing or unfreezing the minimum cumulative resource requirements, which clearly require that the Delaware Energy Office, which is now DNREC's Division of Energy and Climate, "must determine that the cost of complying with the requirements of the Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year":

For a freeze to occur, the *Delaware Energy Office* must determine that the cost of complying with the requirements of the Regulation exceeds 1% for Solar Photovoltaic Energy Resources and 3% for Eligible Energy Resources of the total retail cost of electricity for Retail Electricity Suppliers during the same Compliance Year. The total cost of compliance shall include the costs associated with any ratepayer funded state renewable energy rebate program, REC and SREC purchases, and ACPs and SACPs alternative compliance payments.

26 *Del. Admin. C.* §3008-3.21.1 (emphasis added). Furthermore, the Petitioners had ample opportunity to raise these issues during the Commission's rulemaking process during 2011 but

did not attempt to address their current concerns at that time. *See, e.g.*, Commission Regulation Docket No. 56, Transcript of Public Hearing (Feb. 22, 2011) at 756-57 (remarks of the DPA).

The Commission expressly noted in its Order No. 7933 adopting this regulation that it had considered but declined to adopt regulations addressing the cost calculation, as one of the other parties to the proceeding, Vote Solar Initiative, had requested. Instead, the Commission properly noted in Order No. 7933 that Section 354(i) provided that the State Energy Coordinator (now the Division of Energy and Climate) “in consultation with the Commission may freeze” the solar requirements when certain cost thresholds are exceeded. The Commission further expressly refrained from delving into this sphere, which is properly reserved for DNREC. *See* Commission Regulation Docket No. 56, Order No. 7933, ¶ 21 (“Consequently, the Commission thinks it best to refrain from defining ‘total retail cost of electricity’ until it confers with the State Energy Coordinator in the context of considering a freeze on the solar requirement.”).

5. Second, under 29 *Del. C.* § 8003(7), DNREC has the authority and right to issue rules and regulations deemed necessary by the Secretary:

(7) Establish and promulgate such rules and regulations governing the administration and operation of the Department as may be deemed necessary by the Secretary and which are not inconsistent with the laws of this State.

Furthermore, DNREC was within its authority and responded properly to the petition for rulemaking on these issues filed by Mr. Gary Myers, which referenced 26 *Del. C.* § 10114 of the Administrative Procedures Act, which permit an agency to initiate “Proceedings for the adoption, amendment or repeal of a regulation ... at the request of any person who so petitions the agency on a form prescribed for that purpose by the Director of the Office of Management and Budget.”

Upon receiving the Myers petition, the Division of Energy & Climate initiated a rulemaking proceeding in response to the properly presented petition and in the interest of transparency. The Division chose to promulgate a regulation in the interest of engaging stakeholders in an important matter of statutory interpretation. The regulatory process initiated by DNREC has yielded an open, transparent process in which a variety of interested parties, including the PSC Staff, the DPA, the CRI, the environmental community, and others have had a forum to express their views and influence the proceedings.

6. Third, DNREC has not proposed any regulation that purports to establish a *procedure* for freezing or unfreezing the minimum resource requirement. Contrary to the Petitioners' concerns, the Commission's regulation specifies that the Delaware Energy Office, now DNREC's Division of Energy and Climate, must determine if the cost of compliance exceeds the minimum thresholds; at which point, "The State Energy Coordinator in consultation with the Commission, may freeze the minimum cumulative"² resource requirements. In none of the proposed regulation published by the Delaware Energy Office and now the Division of Energy and Climate did DNREC seek to establish the *procedures* for freeze referred to in 26 Del. C. §362(b). In its most recent version, the Division of Energy and Climate put forth a specific purpose for its proposed regulation that remains properly within the sphere reserved for the Division of Energy and Climate:

1.0 Purpose

These rules govern how the Director of the Division of Energy & Climate ("Director") and the Division of Energy & Climate ("Division") administer their obligations under 26 Del. C. § 354(i) & (j). The statute directs when and whether

² 26 Del. C. § 354(i) and (j)

the Director may institute a freeze on the implementation of the Renewable Energy Portfolio Standards as provided for in 26 Del. C. § 354(a).³

To be clear, the Commission has the authority to promulgate regulations regarding only the procedure, and this procedure must incorporate the cost calculations developed by the Division of Energy and Climate.

7. Fourth, Section 362(b) of the statute requires the Commission to adopt procedures related only to minimum solar requirements, but in strict compliance with this statute, the issue becomes bifurcated. It is unclear in the statute who would adopt procedures for the other eligible resources. So, to maintain consistency between solar and other eligible resources, the Commission has applied its procedures to both the solar and other eligible minimum resource requirements. If the Delaware General Assembly had wanted the Commission to write a prescriptive analytical process for calculating the cost of compliance, there would be no need to have a separate agency such as DNREC involved in the calculation or consulting with the Commission on a potential freeze. The independent determination of the cost by DNREC provides for a balanced view of renewable compliance costs between two important agencies that ensures consultation and an outcome based on the Division of Energy and Climate's consultation with the Commission.

8. Fifth, based on 26 *Del. C.* § 354(i) and (j), the Division of Energy and Climate has the authority and responsibility for calculating the cost of compliance. The General Assembly specifically conferred the function of calculating the total cost of compliance with the minimum cumulative solar photovoltaic and eligible energy resources requirement to the Division of Energy and Climate. This calculation is a separate and precedent step to the decision by the Division of Energy and Climate in consultation with the Commission to freeze those

³ 19 Del. Reg. 270 (Oct. 2015).

requirements. When the legislature grants a specific function to one administrative agency, another agency may not adopt regulations that are inconsistent or conflict with that function.⁴ For this Commission to specify the detailed process by which such calculations would occur assumes a function that the General Assembly specifically reserved for the DNREC Division of Energy and Climate.

9. Lastly, the Petitioners suggest that the Commission has missed the first step in a three-step procedure. They assert the Commission should 1) write the regulations specifying how the cost of compliance is calculated, 2) determine if the cost caps have been reached, and 3) in consultation with the Division of Energy and Climate determine whether there should be a freeze. In contrast, the statute only requires the Commission to adopt rules and regulations to specify the procedures for freezing the minimum requirements, which this Commission has done. The calculation and determination of the cost of compliance is specifically designated to DNREC's Division of Energy and Climate in § 354(i) and (j).

10. The Petitioners further explore the General Assembly's intent with respect to the statute and note that the legislature could have given the specific requirement to adopt rules and procedures to DNREC, but did not. Similarly, the PSC Staff and DNREC note that the General Assembly could have specifically charged the Commission with writing rules by which to calculate the cost of compliance, but did not. Rather, it would appear the General Assembly's intent was to have the Division of Energy and Climate determine the cost of compliance by whatever means they chose within their statutory authority and to consult with the Commission if the compliance costs exceeded the 1% and 3% maximums – at which point the Commission's

⁴ See *Cartanza v. DNREC*, 2008 WL 4682653, at *8-9 (Del. Ch. Oct. 10, 2008) (Master's Report), *adopted* 2009 WL 106554 (Del. Ch. Jan. 12, 2009) (holding that DNREC exceeded its statutory authority when it established criteria for State Resource Areas maps, a function that was specifically conferred to the Open Space Council).

rules would provide the procedures for any actions that would be appropriate. As such, the current framework – where the Commission has adopted regulations regarding the procedure and DNREC is in the process of adopting regulations regarding the cost calculations – is appropriate. The Petitioners’ request that the Commission overstep its own authority and intrude into DNREC’s by promulgating regulations governing the cost calculations should be denied.

WHEREFORE, for the reasons stated above, the Delaware Department of Natural Resources and Environmental Control and the Delaware Public Service Commission Staff respectfully request this Commission find no cause to proceed with this docket to amend 26 *Del. Admin. C.* §3008-3.2.21; adopt the attached proposed Order denying the Petitions filed by the Delaware Division of the Public Advocate and the Caesar Rodney Institute; and close this docket.

Respectfully submitted by,

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Dated: October 27, 2015

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CERTIFICATE OF SERVICE

I, Brenda R. Mayrack, Esq., counsel for Public Service Commission Staff, do hereby certify that on October 27, 2015, I caused the foregoing JOINT MOTION OF THE DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL AND THE DELAWARE PUBLIC SERVICE COMMISSION STAFF REQUESTING THAT THE COMMISSION DENY THE PETITIONS OF THE DELAWARE DIVISION OF THE PUBLIC ADVOCATE AND THE CAESAR RODNEY INSTITUTE to be served by electronic mail on all persons identified below and to be filed with the Delaware Public Service Commission using Delafile.

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